The National Guard: Whose Guard Anyway?

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During the last two years, a growing controversy has been generated by the decision of several governors to stop their National Guard units from training in Latin America. Such a decision by these governors has caused considerable apprehension in defense circles because the training regimen designed by the National Guard Bureau, in cooperation with the Department of the Army, has been interrupted through a purely state decision.

The ability of governors to block legitimately scheduled training raises an important question. If the governors can interpose their authority to block training, could they also interpose state authority at some time in the future to block deployment in a controversial military venture? It is important to explore and understand the extent of the governors' authority because the National Guard plays a critical role in the defense of the United States. Currently the Army National Guard has 452,000 soldiers, the Air National Guard 114,000 airmen. Of the combat divisions in the Army's force structure, 10 are National Guard and 18 are active Army.[1] With the Guard such a significant part of the nation's defense force, understanding the full background of the training issue and its possible impact on the nation's defense structure is vital.

The controversy began in 1986 when the governor of Maine refused to deploy 48 Maine Guardsmen for a planned joint exercise in Honduras.[2] In the months that followed, additional governors either refused Latin American training, announced that if asked they would refuse Latin American training, or requested further information before permitting such training. These actions evoked a spirited public dialogue about the Guard's reliability. Public discussion reached its peak in August 1986 during the governors' conference at Hilton Head, South Carolina. State executives from both parties indicated their desire to retain the states' traditional control of the non-federalized Guard and thus be consulted

before National Guard units were sent on training missions to Central America.[3]

Regrettably, the public debate has generated more heat than light, and the question of who controls the Guard remains largely unanswered. Given the governors' traditional veto authority over the non-federalized Guard's activities, can the Guard be entrusted with the current high level of responsibility in the nation's defense? What are the legal and historical precedents to the recent governors' actions? Does the issue threaten to destroy the current system of active/reserve forces designed to fulfill defense requirements? This article attempts to answer these questions.

Establishing the Militia

The legal basis for today's National Guard rests on the US Constitution and its original amendments as adopted in the last decade of the 18th century. Accordingly, the Congress was granted the powers:

> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.
>
> To provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.[4]

The executive branch was given the following authority:

> The President shall be the Commander in Chief of the Army and Navy of the United States and of the Militia of the several states when called into the actual service of the United States.[5]

The militia sections were strengthened and augmented in 1791 by the second amendment to the Constitution:

> A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.[6]

The origin of the problem with the governors can thus be traced to this early period of American history. The Constitutional Convention debates and committee meetings relating to the militia indicate the intent of the framers to entrust a considerable portion of the nation's defense to the militia. Despite this intent, committee compromises and the flexibility built into some of the provisions have allowed considerable latitude for interpretation. For example, even though the militia could be called forth to

"execute the laws of the Union, suppress insurrections, and repel invasions," the responsibility for determining the level of threat to the nation was not clear to the citizens of the time. It was also unclear whether militia troops should be used to defend the growing nation or only their individual state or territory. Furthermore, the emphasis was on *defending* the country. The concept of using militia troops outside the borders of the United States to defend the country was not included.[7] Equally troublesome and contentious was the delineation of training responsibilities, which reserved the actual training responsibilities of the militia to the states but granted Congress the authority to establish a training regimen.

From a practical standpoint, in 1789 it was not feasible to include in the Constitution stringent national-based standards or requirements for the militia's use. Clauses included were carefully crafted compromises between the factions that wanted a strong, nationally oriented militia and those that desired a state-oriented defense force with little outside interference from the national government.[8] The factions wanting a nationally oriented militia ultimately hoped to remedy the ambiguities of the constitutional provisions through a well-designed Militia Act, necessary in order to implement the constitutional provisions for the militia.

In 1790, a militia act was introduced into the first session of Congress. The proposal was strongly supported by President George Washington and Secretary of War Henry Knox. It would establish a strong militia, trained according to nationally established standards and adequate to serve as the nation's first line of defense in emergencies. The proposal would divide all eligible males into three categories: first tier, ages 18 to 20; second, 21 to 45; and third, 46 to 60. The first tier, as the key force to be mobilized in emergencies, would be intensely trained according to uniform standards (to include either a 10- or 30-day camp of discipline). The second tier would receive less intense training, but would still serve as an important part of the nation's defense force. The older men comprising the third tier would be a reserve force to serve state and local emergency needs. To further insure standardization and readiness, all arms, equipment, and clothing would come from federal stores, and militiamen were to be paid by the federal government while in training camps.[9]

When finally passed in 1792, however, this first Militia Act had been so compromised that it totally lost the key philosophy of its main promoters, Washington and Knox. The act, which was to provide the legal basis of this country's militia until 1903, was based instead on the

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philosophy that all able-bodied men between the ages of 18 and 45 *owed* military service to the nation. Not only did they owe service, they were required to buy their own equipment. Regrettably, there were no specifics on training standards or the frequency of training and no provisions for federal inspections to insure some type of national standardization. The militia was to muster once a year, even if it had no arms or equipment.[10]

The congressional failure to adopt a strong militia act resulted in a series of disputes between the states and the federal government, disputes which served as precursors to the current controversy. For example, on 18 April 1812, the United States went to war against Britain. With state officials holding strong powers under the Militia Act of 1792, the governor of Connecticut determined that the presence of the British fleet off the US coast did not indicate an imminent invasion threat and declined to send Connecticut troops. The governor of Massachusetts also refused the president's call for militia.[11]

Once the war began, Ohio militia under Brigadier General William Hull refused to cross the Canadian border near Detroit, since they had been called to duty to repel invasion, not to participate in one. Similarly, when Major General Stephen Van Rensselaer tried to get New York militia to cross the Niagara River and enter Canada, they refused to invade foreign territory. This does not mean that the militia failed miserably. The prominent land victory of the war, the Battle of New Orleans, was won by Andrew Jackson, a militiaman from Tennessee, commanding a body of militia troops and irregulars. What became obvious (and ominous) through the War of 1812 was the control that governors had in alerting or failing to alert the militia for federal duty.[12] Perhaps worse yet were the limiting perceptions that many state officials and the militiamen themselves had of their role in the defense of the country. They saw their duty as repelling invasion (strictly interpreted) and suppressing insurrections. They were reluctant to leave the state they were sworn to protect and certainly were not inclined to leave the nation. The War of 1812 also showed that a governor could personally interpret the level of threat and determine whether the danger to the nation was sufficient to heed the president's call for troops.[13]

In the years following the War of 1812, no serious attempts were made to remedy these shortcomings. Reforms failed to materialize despite the fact that the militia was the nation's military reserve force in the event of an emergency. The militia remained a state force, operating (while in a non-federalized status) under state standards. All states had militia laws, but few provided adequate funding and training, and equipment standards varied considerably.[14] Consequently, as the years passed, the militia system created by the act of 1792 fell into disuse. The enrolled militia, consisting of all white, free males from 18 to 45, was replaced by a different type of organization that evolved outside the official framework of the Militia Act—the volunteer militia.

The volunteer militia was not established through new legislation but came into existence because of popular interest and the flexibility of existing state laws. Throughout the country, groups of citizens interested in martial spirit, drill, pomp, and ceremony began to form volunteer militia companies. The first half of the 19th century saw many units of this type formed, embracing such widely scattered states as New Jersey, Florida, Wisconsin, Texas, and California. Each volunteer had to purchase his own uniform and weapon. Once a unit was formed, it applied for state recognition and state commissioning of its officers. This type of unit was employed as the backbone of militia strength for the Mexican War, the Indian campaigns, and the American Civil War.

At no time during the 19th century, however, was there a serious attempt to remedy obvious ills of the militia—either volunteer or enrolled. No national standards for training, uniforms, or equipment existed, with the result that considerable variance in militia readiness prevailed. To make matters worse, governors continued on occasion to refuse a president's call for troops.[15] Indeed, during the 19th century there was no resolution to either the command and jurisdiction problems or the issue of training standards for the militia.

Twentieth-Century Changes

The reorganization of the militia to strengthen its national role and provide uniform standards for training and equipment began in the early 20th century. Owing to a multitude of problems in the Spanish-American War with both the active Army and the militia (or, the National Guard, as it was coming to be called[16]), pressure grew to strengthen both institutions. Subsequently, in a series of new legislative initiatives stretching from 1903 through 1916, the character of the Guard was noticeably changed.

A prime example was the 1903 Dick Act, which provided federal funds for equipment and arms for National Guard units. To qualify for federal funds, the states were required to assemble their soldiers at least 24 times a year for drill, conduct a minimum of five days of summer camp, and stand a formal inspection by either a militia or active Army officer. Further, to promote commonality between Army and Guard practices, active Army officers were assigned to duty as advisors to Guard units.[17]

The Dick Act was followed by the Militia Act of 1908 (called by some the second Dick Act) which increased federal appropriations for the Guard and underscored the national role of the Guard. It accomplished the latter by specifying that all branches of the Guard had to be called before any non-militia volunteers could be called by the federal government. Perhaps the most important feature of the second Dick Act was the provision requiring that the National Guard was to be available either within or without US territory.[18]

Thus, in the first decade of the 20th century lawmakers initiated serious attempts to resolve two problems which had caused many to question the militia's reliability: the lack of adequate training and the legal issue surrounding the deployment of National Guard units outside the continental United States. Though these legislative initiatives set clearer training standards for the Guard, however, the authority of the national government to deploy state-based troops outside the country continued to be a thorny issue.

This problem was underscored in 1912 when the Judge Advocate General ruled that there was no constitutional provision for federal use of the National Guard outside US borders.[19] In a subsequent opinion issued the same year, the Attorney General of the United States concurred with the Judge Advocate General.[20] Seemingly, this issue was resolved through the sweeping changes initiated by the 1916 National Defense Act. This act, in addition to setting training standards for the National Guard, authorized two types of National Guard mobilizations.[21] In accordance with the act's provisions, when the president called for National Guard troops through the governor, they were militia (presumably limited in their deployability by geographical considerations). But when Congress authorized the use of military power exceeding that of the regular forces available, the president could draft into federal service members of the National Guard. These conscripted members were then liable to serve the nation for the time and place specified by the president and, in fact, ceased to be a part of the regular militia.[22] While this act permitted a large commitment of Guard forces for World War I (17 divisions),[23] they were drafted into federal service as a part of the Army; regiments with proud histories and tradition were broken up, and their National Guard identity and cohesion were ignored. Some method was needed to permit Guard units to enter federal service and serve as federalized Guard regiments and divisions rather than to be drafted as units or individuals.

In 1933, in response to the National Guard Association's concern over the loss of unit identity in World War I and lingering congressional concern over the legality of overseas deployments of the Guard (because of the Constitution's militia clause),[24] amendments to the 1916 National Defense Act were passed. In a sense these 1933 amendments added another tier to the structure of the armed forces by creating the National Guard of the United States, whose personnel and organization were identical to the National Guard of the various states. This new organization was part of the reserve component of the Army at all times and was administered under the Army clause of the Constitution rather than the militia clause. With this provision Congress created a *doppelgänger*, a shadowy double, for the National Guard as it existed in the states. This double had definite national responsibilities.[25] Even more significant is the testimony of key congress-

men, who apparently believed that the amendments tailored the militia force to be in keeping with General Washington's philosophy on the militia.[26]

As a result, whenever Congress declared a national emergency, the president had the power to order units into federal service. This order to federal service would be under the Army clause as a National Guard of the United States. Once in federal service the Army was to keep Guard units intact, insofar as possible. Though the president was given the power to order the National Guard of the United States into federal service, the National Guard of the various states could still be called to federal service under the militia clause through the governors of the states.[27] With the amendments of 1933 the basic structure of today's National Guard was in place.

The Current Controversy

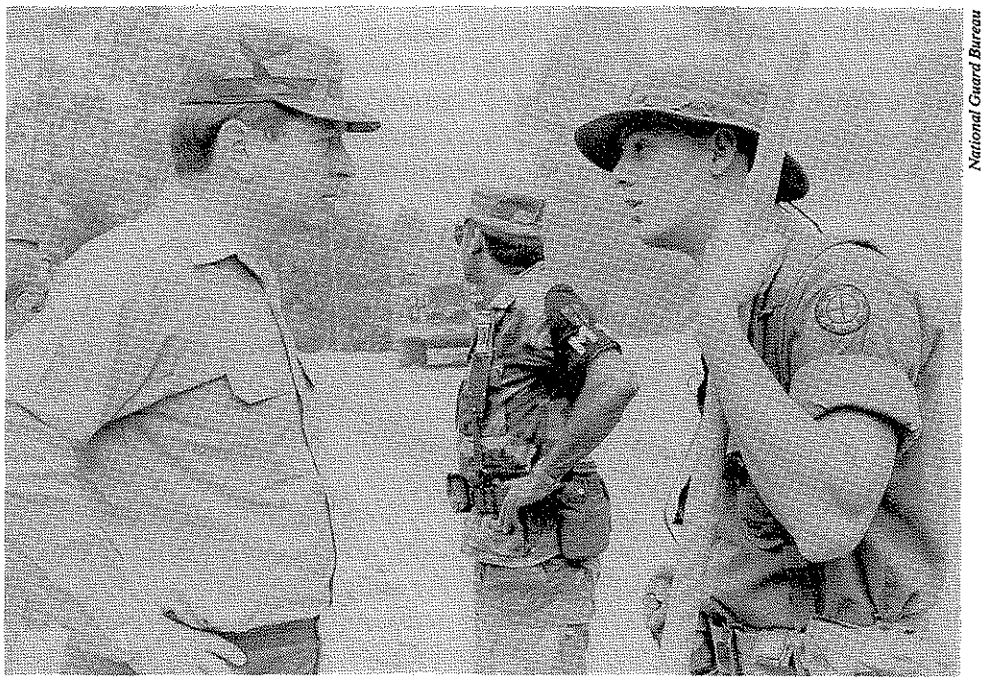
As governors began threatening to block training missions in Latin America, an amendment was added to the Fiscal Year 1987 Defense Authorization Act. It stated:

> With regard to active duty outside the United States, its territories, and its possessions, the consent of the governor described in subsections 672(b) and 672(d) of title 10 may not be withheld in whole or in part because of any objection to location, purpose, type, or schedule of such active duty.[28]

By this amendment, which was sponsored by Representative G. V. "Sonny" Montgomery (of Mississippi) in a move friendly to the National Guard Bureau and the Department of Defense, Congress essentially stripped the governors of their power to prohibit overseas Guard training.[29]

As could be expected, once signed into law by President Reagan on 14 November 1986, this new provision was promptly challenged. In January 1987 Minnesota Governor Rudy Perpich and State Attorney General Hubert H. Humphrey III filed suit in US District Court.[30] The Minnesota case contended that the amendment to the Defense Authorization Act "offends the militia clause by impermissibly impinging upon the state's authority of training the militia."[31] Supporting this contention, the Governor argued that the militia clause of the Constitution reserves to each state exclusive power over the training of the National Guard.

In the time that elapsed between the filing of the suit and the court's decision on 3 August 1987, the number of states that supported Minnesota fluctuated, as had the number that originally objected to Latin American training missions. At one time, as many as 11 states were supposedly friendly to Minnesota's move.[32] Some were friendly owing to their objections specifically to Latin American training, while others simply objected to the removal of a state power through an enactment by Congress.



National Guard Bureau

Missouri Governor John Ashcroft chats with a constituent—a Missouri Army National Guardsman training in Honduras.

Two significant elements were forgotten or ignored in the state's suit. First, according to constitutional provisions, states were given authority to train the militia, but only according to *the discipline prescribed by Congress*. Contrary to the inference of the Minnesota suit, Congress constitutionally has an important role in the training of the militia. Second, the gubernatorial veto over two-week annual training is not a constitutional power, but rather a power granted by Congress through the 1952 Armed Forces Reserve Act.[33] Even as Congress granted this power, intending to permit states to retain their Guard in times of state emergencies, it had the power to remove it.

On 3 August 1987, the US District Court rendered its decision. It found that the gubernatorial veto is not constitutionally founded and thus Congress is not barred from adopting a provision which withholds the governors' ability to veto scheduled training based on the location, type, purpose, or schedule of active duty.[34] Governor Perpich immediately announced his intention to appeal, but for the present National Guard troops will continue to train as scheduled in Latin America. While some governors are displeased with this decision, most notably Governor Mike Dukakis of Massachusetts, they plan to obey the law of the land while awaiting an appellate court decision.[35]

The question remains, however, as to the effects of this struggle on the nation's carefully crafted defense system, composed of active component, Reserve, and National Guard. This is a critical question in view of the contingency reinforcement role of National Guard units when and if the balloon goes up in Europe. Nine National Guard divisions, for example, are scheduled for early deployment to Europe in the event of such a crisis, and a successful NATO defense presupposes their timely arrival in fighting trim. Furthermore, four *active* Army divisions in the United States' continental reserve each have a National Guard "round-out brigade" which would have to be activated to bring the division to combat strength. The gradual replacement of active by inactive units in the force structure has been necessitated by a declining active Army end-strength. Ominously, the trend may continue, for even now there is speculation that the round-out process will be renewed as the Army continues its budget-induced drop from its long-time active strength of 781,000.[36]

Despite the continuing uncertainty as to the ultimate resolution of the issue involving the governors' challenge to overseas National Guard training, the credibility of the Guard in the nation's defense is not really in jeopardy. Deployment of the Guard for active duty in a national emergency or as a result of a congressional declaration of war has never been questioned. Since the first Dick Act in 1903, lawmakers have carefully tailored the National Guard, in accordance with constitutional powers, into a force with state and national responsibilities. Through this century's legislative reforms, the Guard's role has been made clearer, as have its responsibilities to both the president and the individual state governors.

Even more important, as the controversy has continued, the majority of the National Guard units have attended their scheduled annual training in a variety of countries and in the United States. For more than ten years National Guardsmen have routinely trained overseas; in FY 1987 some 31,059 Guardsmen participated in overseas training in 35 countries.[37] Army Guard units continue training in Germany, England, and Korea; Air Guard units train all over the globe. The basic training regimen continues to function, with objections centering only on Latin American training missions. No political actor objects to a well-trained Guard. The issue is confined solely to the geographical areas within which training may permissibly be conducted.

We may thus draw three major conclusions. First, even though there has been a legal challenge to the present training protocols, the system has thus far weathered the storm. If long-term congressional intent is considered by our court system, the present system is likely to continue virtually intact. Second, a review of congressional documents and enacted legislation reveals that from the Constitutional Convention to the present, Congress has intended that the militia or National Guard have an important role in national defense. Since training and readiness for the nation's armed

forces, whether they be Guard, Reserve, or active component, is vital to national security, it is likely that Congress will always find ways to assure effective training despite efforts by a coterie of governors to interpose their authority between the Guard and training scheduled by the Department of the Army.

Third, and perhaps most significant, the issue has not arisen over Guard training in Europe, Asia, or the continental United States, but only over training scheduled in recent years in Latin America. The training controversy arose in part because some governors objected to training in an area where insurgency is a serious problem and where Guardsmen could become casualties. But the primary reason these governors sought to curtail training missions in Latin America seemed to be their political opposition to President Reagan's policies in the area.

In the future, we can hope that governors will find other avenues to air their foreign policy differences with the president. The Guard's role in national defense and its training are too important to permit them to become a political football. Apparently, both Congress and the courts agree.

NOTES

1. Figures supplied by Major Leonid Kondratiuk, Historical Services Team, National Guard Bureau, 1 December 1987.
2. Edward J. Philbin, "States Rights," *National Guard*, 41 (April 1987), 21-26.
3. "Hands Off National Guard Governors Say," *Washington Post*, 27 August 1986, p. A-5.
4. US Constitution, Art. I, sec. 1.
5. Ibid., Art. II, sec. 2.
6. Ibid., Amendment II.
7. This is not to say the subject was not discussed. In a well-researched and reasoned paper written for the Adjutant General of Oregon, Major James D. Noteboom, Assistant State Judge Advocate, opines that James Madison's papers indicate the intent of the framers to use the militia in a larger role to include extraterritorial use (*Legal History of the National Guard as it Relates to State and Federal Control of the National Guard*, p. 6).
8. James D. Noteboom, *The Origins of the Militia Provisions of the United States Constitution* (Salem: Oregon National Guard, 1987), pp. 12-20.
9. The Knox Plan called for a very strong role by the federal government in supporting the militia. It required the US government to make adequate provision to supply arms, clothing, rations, artillery, ammunition, forage, straw, tents, and camp equipment for the annual camps of discipline. This proposed strong role of the federal government in militia affairs doomed the Knox Bill to such heavy amendments that it lost its real purpose. As a proposal by the Federalist faction, it was bitterly opposed by those who favored states' rights. Knox's Plan is detailed in the *Annals of Congress*, 1st Cong., 2d Sess. (1789-1790), II (Washington: Gales & Seaton, 1834), 2142-62.
10. The actual law can be found in the *Annals of Congress*, 2d. Cong., 1st Sess. (1791-1792) (Washington: Gales & Seaton, 1849), pp. 1370-72.
11. The Judicial Court of the Commonwealth reviewed this decision of the governor and sustained it (Opinion of the Justices, 8 Massachusetts, 548, 1812), but in 1827 the Supreme Court in Martin v. Mott ruled that the president's determination to call forth the militia was binding and conclusive on all, and was *not* subject to judicial review.
12. James Monroe, appointed Secretary of War during the War of 1812, was certain the militia system had failed and thus proposed a national reserve army with no state affiliation to replace it. This proposal failed, and with militia and volunteers winning the Battle of New Orleans, attempts at reforming or replacing the militia faded.
13. It is important to note that while the militia and some of the states' governors balked during the war, the major problem exposed by the war was not the militia, it was that of leadership. The United

States stumbled blindly into the War of 1812 with virtually no strategy, no strategic doctrine, and no true military leadership. See Russell F. Weigley, *The American Way of War* (Bloomington: Indiana Univ. Press, 1977), p. 55.

14. The Militia Act of 1792 failed to provide federal funds for militia units, and regrettably neither did many of the states. A few like New York, Massachusetts, Connecticut, and Pennsylvania provided state funds and built strong militias, but in most states the militia fell into disuse.

15. The prime example is the War of 1812, though in the American Civil War, Kentucky, Missouri, and Tennessee refused Lincoln's initial call for troops.

16. The term "National Guard" is comparatively new, now used in preference to the militia. The movement to refer to the state forces as the National Guard began in the late 1870s and early 1880s. The old state-enrolled militias were in many respects a defensive formation, but the emergence of the organized militia or the National Guard brought the militia into the era where it was recognized as the first-line reserve of the Army in time of emergency. Thus the adoption of the term National Guard is significant, clearly indicating the Guard's role in the nation's defense.

17. Frederick B. Wiener, "The Militia Clause of the Constitution" *Harvard Law Review*, 54 (December 1940), 193-96. See also Charles Dick, "When General Dick Took A Look at the Dick Act," *National Guard*, 34 (January/February 1980), 23-25, 39.

18. Wiener, p. 197.

19. E. H. Crowder, Judge Advocate General of the Army, in an opinion issued in 1912 (*Digest of the Opinions of the Judge Advocate General of the Army 1912-1940* [Washington: GPO, 1942], p. 644).

20. Opinion of the US Attorney General (Washington: US Department of Justice, 1913), Opinion No. 322.

21. The National Defense Act of 1916 accomplished a number of reforms. The number of "drill periods" was doubled, summer encampment was changed from five to 15 days, and active component officers were assigned to Guard units as advisors. In addition, Guard units had to be organized in accordance with Army Tables of Organization. See *The National Defense Act Approved June 3, 1916, as amended, to January 1, 1945, inclusive with Related Acts and Notes.*

22. See the *National Defense Act*, Sec. III, p. 135.

23. National Guard Bureau, Office of Public Affairs, *A Brief History of the Militia and the National Guard* (Washington: National Guard Bureau, 1986), p. 37.

24. See House Report to accompany HR 5645 (No. 141) in the first session of the 73d Congress (1933), pp. 1-5.

25. Act of 15 June 1933, *The Statutes at Large of the United States of America From March 1933 to June 1934*, Vol. XLVIII, Part 1, pp. 153-62.

26. This fact was noted in House of Representatives Report No. 141, 1st Session of the 73d Congress (1933), p. 26.

27. The *doppelganger* situation has not caused serious problems for the Guard. However, the reader should review the Little Rock controversy in 1955 to see the legal problems that can occur. When the Little Rock school desegregation controversy emerged in the fall of 1957, Governor Orville Faubus called out the Arkansas National Guard to maintain law and order. Since they in actuality were being used to bolster the segregationist position, President Dwight Eisenhower called the Arkansas Guard to federal service, in essence requiring them to obey the national Commander in Chief rather than the state. Though the Arkansas Guard obeyed the President, the Little Rock situation posed an interesting dilemma for soldiers of the state.

28. US Code, 501, proposed amendment. The amendment was passed as House Joint Resolution 738.

29. Ibid.

30. United States District Court, District of Minnesota, Third Division, Minnesota; Perpich v. United States, Department of Defense, et al., Memorandum Order of August 3, 1987.

31. Ibid.

32. "11 States Seek to Bar Foreign Training of Guard," *The New York Times*, 17 June 1987, p. A10.

33. *United States Code, Congressional and Administrative News*, 52d Cong., 2d Sess., 1952, I, 468.

34. Perpich v. Department of Defense, et al.

35. Further, Minnesota troops continued to train on schedule, including assignments outside the United States, while the case was in litigation. For Governor Dukakis's position, see Larry Carney, "Dukakis Sues Against Deployment," *Army Times*, 22 February 1988, p. 35.

36. See Larry Carney, "'89 Budget Cuts Active, Keeps Reserve Buildup," *Army Times*, 29 February 1988, pp. 1, 6.

37. Figures for FY 87 were supplied by Public Affairs, National Guard Bureau.